1795, and still in force in the latter country, is a good one. This "renders all the inhabitants of the city concerned jointly and severally liable to pay compensation for all public crimes committed against persons and property by a mob." And he adds, "although framed in a bygone age, it might still perhaps be usefully applied elsewhere than in Belgium."

Papers on contraband of war were read by Mr. Justice Kennedy and by Judge Charles B. Elliott of the Supreme Court of Minnesota; also one by Sir Thomas Barclay on the "Most Favored Nation Clause in Treaties of Commerce." J. F. B.

THE EXTENT TO WHICH THE ACTION OF MEDICAL BOARDS MAY BE CONTROLLED BY MANDAMUS.—This question is considered by the Supreme Court of Missouri in the recent case of *State ex rel. McCleary* v. *Adcock et al.* (Nov. 6, 1907), 105 S. W. Rep. 270, and the discussion and conclusion therein are such as to warrant notice and comment. It appears that the medical law of the state by its terms does not apply to the student who was matriculated in a medical college on or prior to a date named, but provides that it shall be the duty of the state board of health, which is by law the medical board of the state, upon receiving the fee named in the statute from such student, to issue to him a license to practice medicine, if he present to such board a diploma from any medical college of the state. The relator had complied with the requirements of the statute as to the payment of the fee and as to the presentation to said board of a diploma from a medical college of the state, and he claimed to have complied with it as to the time of his matriculation in a medical college and to be entitled to a license to practice from said board. The board, however, denied him a license upon the ground that he had failed to produce evidence satisfactory to the board that he was a medical college matriculate on or prior to the date mentioned in the statute. The relator then began mandamus proceedings, which resulted in an issue in the supreme court, upon which testimony was taken by a commissioner specially appointed by the court for that purpose. His report, with which all the testimony in the case was returned, concluded with the findings that the relator had matriculated prior to the date mentioned in the statute, "and had established that fact by the great weight of evidence both at the hearing before the board of health and before" the commissioner; that "the board of health did not give to the relator's evidence the weight and consideration to which it was entitled, and in that respect acted without due regard to the legal rights of relator"; that the relator had complied with all other conditions of the statute. The commissioner recommended that the peremptory writ issue. The conclusions of the commissioner as to the facts were adopted by the supreme court, and a peremptory writ was ordered in accordance with his recommendation.

The respondent board claimed that in deciding the question as to whether or not relator was a medical matriculate on or prior to the date mentioned in the statute, adversely to relator, it had exercised its discretion in regard to a matter within its jurisdiction, and that its conclusion was final. But the supreme court, while recognizing apparently that such a board may be

clothed with discretionary powers and that, when such powers are properly and reasonably exercised, they cannot be controlled by mandamus, holds that the writ should issue to correct the abuse of discretion; that whether or not discretion has been reasonably exercised or abused, is a question for the courts; that the great weight of evidence shows that the relator matriculated prior to the date named in the statute and that it is an injustice to him, which the courts should correct by mandamus, for the board, under the circumstances, to withhold his license.

From a reading of the case it is quite apparent that the attitude of the supreme court in regard to the weight of evidence is correct. And the court was undoubtedly right in its conclusion that the abuse of discretion on the part of the board was such as to warrant the issuing of the peremptory writ. But there is an opportunity for a difference of opinion in regard to the suggestion of the court that in a matter of this kind the medical board acts ministerially. After having discussed the question of the arbitrary exercise of discretionary power, and reached the conclusion indicated above, the court says: "But beyond all this, and decisive of this case, the board acts ministerially in a matter of this kind. If the conditions exist, the license must be granted. If the conditions exist, there is no discretion, but the license must be issued. If the board cannot act judicially, * * * this case resolves itself into the plain proposition,—do or do not the conditions exist? If so, the license must go." In the issuing of the license, the board undoubtedly acts ministerially, but in determining as to whether or not the conditions exist that warrant the issuing of a license, it would seem that the board acts in at least a quasi-judicial capacity. Such is apparently the opinion of this court in other cases involving similar questions. While in *State ex rel. McAnally* v. *Goodier et al.,* 195 Mo. 551, 93 S. W. Rep. 928, it is said that the state board of health, which is the medical board, "is merely a governmental agency, exercising ministerial functions," and that "the duties of the board are of an administrative or ministerial character," yet in *State ex rel. Granville* v. *Gregory,* 83 Mo. 123, 136, this court said: "The board of health, in the discharge of duties in reference to the issuance of certificates, is engaged in the performance of those things which essentially partake of a judicial nature, requiring the examination of evidence and passing on its probative force and effect, requiring the exercise of judgment and the employment of discretion." And in *State ex rel. Hathaway* v. *State Board of Health,* 103 Mo. 22, 15 S. W. Rep. 322, this court, in considering that part of the medical law that authorizes the refusal and revocation of certificates for unprofessional or dishonorable conduct, said: "This section of the statute imposes upon the board duties which are quasi-judicial in their character. The question whether the applicant is guilty of unprofessional or dishonorable conduct calls for the exercise of judgment and sound discretion. It is a question as to which the board must hear the evidence and pronounce a conclusion."

It would seem to be a correct statement of the functions of a board of medical examiners to say of it, as is said substantially in the last cited case, that in the performance of its duties, other than those that are merely formal, it acts in a quasi-judicial capacity, as it must pass upon facts and reach

conclusions, but that in so doing it is not exercising judicial functions, as that term is used when applied to the regularly constituted judicial tribunals, and that it does not, therefore, trench upon the judicial department of the government. See *Raaf* v. *State Board of Medical Examiners,* 11 Idaho 707, 84 Pac. Rep. 33; *People* v. *Hasbrouck,* 11 Utah 291, 39 Pac. Rep. 918; *State* v. *Hathaway,* 115 Mo. 36, 21 S. W. Rep. 1081; *Iowa Eclectic Medical College Assn.* v. *Schrader,* 87 Iowa 659, 55 N. W. Rep. 24, 20 L. R. A. 355; *Van Vleck* v. *Board of Dental Examiners,* (Cal.) 48 Pac. Rep. 223; *State* v. *Chittenden,* 127 Wis. 468, 502, 107 N. W. Rep. 500.

The foregoing is pertinent in this connection in view of the fact that the judicial quality of many of the functions of medical boards is a matter of supreme importance in any attempt to determine the extent to which the action of such boards may be controlled by mandamus.

In general, the office of the writ of mandamus is to compel the performance of mere ministerial acts prescribed by law. It may compel a board of medical examiners, for example, to perform any act that is strictly within the ministerial functions of the board. The writ also may issue to subordinate judicial tribunals to compel them to act where it is their duty to act. But it is not a part of the office of the writ to interfere with the exercise of judicial power or discretion, in the absence of abuse, whatever may be the character of the officer or body that exercises that power or discretion. As is said by the New York Court of Appeals, in speaking of the general functions of the writ: "It is not, like a writ of error or appeal, a remedy for erroneous decisions. * * * A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment. The character of the duty, and not that of the body or officer, determines how far performance of the duty may be enforced by mandamus. Where a subordinate body is vested with power to determine a question of fact, the duty is judicial, and though it can be compelled by mandamus to determine the fact, it cannot be directed to decide in a particular way, however clearly it be made to appear what the decision ought to be." *People ex rel. Francis* v. *Common Council of the City of Troy,* 78 N. Y. 33. In accordance with this principle, a medical board may be compelled by mandamus to decide a question that calls for the exercise of its judgment and discretion, but it cannot be compelled to decide in a particular way, nor can its conclusion be disturbed in the absence of abuse by the board of its discretionary authority. The Supreme Court of Missouri, in discussing the question in *State ex rel. Granville* v. *Gregory,* 83 Mo. 123, uses the following language: "While courts on suitable occasions will apply the spur of mandamus to put the discretion of inferior courts and officers in motion, yet after that discretion has been exercised, as in the case at bar, no matter in what way, the mandatory authority to compel the doing of the particular act prayed for is at an end. Of course these remarks have no relevancy to acts simply ministerial, where no judgment is to be exercised; but this case is not regarded as of that character, and whenever an element, shred or degree of discretion enters into the duty to be performed, the functions of mandatory authority are shorn of their customary potency and become powerless to dictate terms to that discretion. Were the rule other-

wise, instead of officers discharging their duties in accordance with their own official discretion, that of a court would be substituted therefor."

The whole matter may be summed up in the following statement, which finds abundant support in the cases cited: The purely administrative or ministerial functions of a board of medical examiners are subject to control by mandamus. If a board should fail to act when it is its duty to act, action may be compelled. But insofar as the functions of a board are discretionary in their nature, and hence of a quasi-judicial character, they cannot, in the absence of abuse of discretion, be reached by mandamus. Abuse of discretion, however, or any acts on the part of a board that are arbitrary or irregular will justify the use of the writ. *People ex rel. Sheppard* v. *State Board of Dental Examiners,* 110 Ill. 180; *Dental Examiners* v. *People,* 123 Ill. 227; *Illinois State Board of Health* v. *People,* 102 Ill. App. 614; *State ex rel. Powell* v. *State Medical Examining Board,* 32 Minn. 324, 20 N. W. Rep. 238, 50 Am. Rep. 575; *State ex rel. Granville* v. *Gregory,* 83 Mo. 123; *Williams* v. *Dental Examiners,* 93 Tenn. 619, 27 S. W. Rep. 1019; *State ex rel. Kirchgessner* v. *Board of Health of Hudson County,* 53 N. J. Law 594, 22 Atl. Rep. 226; *Van Vleck* v. *Board of Dental Examiners* (Cal.), 48 Pac. Rep. 223.

H. B. H.

LIABILITY FOR INJURIES ARISING FROM THE USE OF DANGEROUS SUBSTANCES SOLD IN THE OPEN MARKET.—The defendant, Rommeck, a retail hardware dealer, sold to the plaintiff a package of stove polish manufactured by defendant, Crosby & Co. When plaintiff attempted to use the polish, it exploded, injuring her. The declaration proceeded on the theory that there rested upon both defendants the positive duty of knowing that the polish was a dangerous substance, and that they should not manufacture and sell dangerous and inflammable substances. There was no averment that defendants had actual knowledge of the inflammable nature of the goods, nor was it averred in what manner they were negligent in not knowing their inflammable nature. Both defendants demurred, Rommeck's demurrer being sustained, and that of Crosby & Co. being overruled. The Supreme Court in *Clement* v. *Crosby & Company,* 148 Mich. 293, 111 N. W. 745, affirmed the overruling of the corporation's demurrer, and in the present case the court affirms the judgment sustaining Rommeck's demurrer. *Clement* v. *Rommeck* (1907), — Mich —, 113 N. W. Rep. 286.

The question which presents itself squarely for decision is whether a retail merchant who buys in the open market stove polish which purports to be safe and proper for use, and sells the article for a purpose for which it is apparently intended, is liable, *in the absence of negligence,* if it turn out that the article is not adapted to the use and causes injury. In *Clement* v. *Crosby & Company,* supra, the court overruled the demurrer, but the declaration was so drawn that it was not necessary to decide whether or not actual knowledge of the dangerous properties must be shown to be in the manufacturer to render it liable in the circumstances, and the court expressly said that they did not mean to determine the necessity of a scienter, although the allegation of